Supreme Court, U. S.
FILED
NOV 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-665

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Petitioners,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Respondents.

and Consolidated Cases.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARVEY GOLDSTEIN
and
FUCHSBERG & FUCHSBERG
Attorneys for Petitioners, Thomas I. Fitzgerald, as Administrator of Estate, etc.
250 Broadway
New York, New York 10007
212—962-2800

HARVEY GOLDSTEIN,
On the Petition

TABLE OF CONTENTS

PAGE

Statement 1

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

Facts 3

REASONS FOR GRANTING THE WRIT

POINT I—

This Court Should Now Determine Whether the Destruction of Statutory Rights of Beneficiaries Under the Death on the High Seas Act, 46 U.S.C. §761, et seq., Would Be Permitted Under the Doctrine of *Forum Non Conveniens* When the Law of the Alternative Forum Precluded Classes of Beneficiaries From Any Remedy 4

PAGE

POINT II—

Was There an Improper Denial by the Court Below of Constitutional Rights of Beneficiaries Represented by the Petitioners Herein by the Dismissal and Forced Transfer of the Suit to England Under the Doctrine of *Forum Non Conveniens* Where the Suit, Predicated Upon United States Statutory Law, Was Properly Brought in the United States Against a United States Corporation Having Its Operation and Principal Place of Busines in the United States and When the Foreign Forum Would Apply Its Local Law and Not the United States Statute Upon Which the Original Suit Was Predicated 7

POINT III—

The Court Below Improperly and in Conflict With Decisions of Other Courts of Appeals, Permitted a Transfer Under the Doctrine of *Forum Non Conveniens* on the Ground of Convenience to Parties Where Both the Identity of Witnesses and Their Testimony, a Requirement Under the Doctrine, Were and Are Unknown 8

CONCLUSION 10

APPENDIX:

The Appendix Hereto is That Annexed to the Petition of Hapag-Lloyd, etc., Previously Filed With This Court. References Herein Are to That Appendix.

Citations

Cases: PAGE

Bartholomew v. *Universe*, 263 F.2d 437 7
Berwind-White v. *Pitney*, 187 F.2d 665 4

Chicago v. *Hugh*, 232 F.2d 584 9

Fitzgerald v. *Westland*, 369 F.2d 499 5

Gkiafis v. *S/S Yiosonas*, 387 F.2d 460 6

Hellenic v. *Rhoditis*, 398 U.S. 306 7
Heredia v. *Davies*, 12 F.2d 500 6

Ingram v. *Ohio*, 505 F.2d 1364 4

Lauritzen v. *Larsen*, 345 U.S. 571 7
Lekkas v. *M/V Caledonia*, 443 F.2d 10 8

Morania v. *M. & J. Tracy*, 312 F.2d 78 4

Risdal & Anderson, Pet., 291 F.Supp. 353 5
Romero v. *International*, 358 U.S. 354 7

Sea-Land v. *Gaudet*, 414 U.S. 573 5

Vulcania, The, 32 F.Supp. 815 5

Statutes:

28 U.S.C. §1254(1) (Jurisdiction and Venue) 2
28 U.S.C. §1333(1) (Jurisdiction) 3
46 U.S.C. §761, et seq. (Death on the High Seas Act) 2, 3, 4, 5, 7
Lord Campbell's Act, St. 9 and 10 Vict. 93 ..... 5, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Petitioners,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Respondents.

and Consolidated Cases.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioners, Thomas I. Fitzgerald, Public Administrator of the County of New York and Administrator of the Estate of Hagen Pastewka, deceased, and Monica Pastewka, individually (hereinafter referred to as Wrongful Death Petitioners), respectfully join with Petitioners Hapag-Lloyd, A.G. and Stork Amsterdam, N.V., et al. (hereinafter referred to as Petitioners Hapag-Lloyd, etc.) in this request for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Said application by

Petitioners Hapag-Lloyd, etc., has been previously filed with this Honorable Court, noting that the instant petition would be timely filed on or before November 4, 1975.

Opinions Below

The opinions below are as set forth in the Petition of Hapag-Lloyd, etc. and are reproduced in the appendix annexed to that petition.

Jurisdiction

The jurisdiction of this Court is as stated in the Petition of Hapag-Lloyd, etc., and is respectfully invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where a United States statute, the Death on the High Seas Act, 46 U.S.C. §761, et seq., permitted recovery to classes of beneficiaries and the alternative forum did not, did the Court below improperly compel transfer of the cause under the doctrine of *forum non conveniens* in derogation of the statutory rights of the classes of beneficiaries now denied relief in the alternative forum?

2. In a suit predicated upon United States statutory law, Death on the High Seas Act, supra, properly brought in the United States, against a United States corporation, having its operation and principal place of business in the United States, was the forced transfer of the cause to a foreign forum, with the loss of United States statutory rights, an improper denial of Constitutional rights to the classes of beneficiaries coming under the statute?

3. Did the Court below improperly transfer this matter under the doctrine of *forum non conveniens* on the ground of convenience of witnesses to parties where both the numbers and identity of the witnesses and the relevancy of their testimony were unknown; the decision in conflict with the Courts of Appeals for the Fourth and Tenth Circuits?

Constitutional Provisions and Statutes Involved

Wrongful Death Petitioners predicated their suits, inter alia, upon the Death on the High Seas Act, 46 U.S.C. §761, et seq.

Statement of the Case

Wrongful Death Petitioners based their suits upon 28 U.S.C. §1333(1), as is set forth in the Statement of the Case by Petitioners Hapag-Lloyd, etc.

Facts

The facts as set forth by Petitioners, Hapag-Lloyd, etc., are correct and are respectfully offered on behalf of petitioners herein.

Additionally, the wrongful death suits were first brought against defendants Texaco, Inc. and its wholly owned subsidiary, Texaco Panama, Inc. for the negligence and failure of Texaco's officers at its principal place of business in New York to direct that a search be undertaken to locate and mark the sunken hull of the "Texaco Caribbean", upon advice of its subsidiary office in London that an offer to locate had been made by the salvage company, Smit-Tak/Rotterdam. The failure of the New York office hierarchy over a period of more than 27 hours to take some action; to

do anything for some 24 hours after the Trinity House vessel, "Siren", was dispatched; and for some 15 hours after it was known to all that the "Siren" had not and could not locate the submerged hull of the "Texaco Caribbean", it is respectfully submitted, constituted negligence by Texaco, Inc. for the failure of its New York office to carry out its responsibility to mark and to buoy under the law as laid down in *Ingram* v. *Ohio,* 505 F.2d 1364 (6C); *Berwind-White* v. *Pitney,* 187 F.2d 665 (2C); *Morania* v. *M. & J. Tracy,* 312 F.2d 78(2C).

REASONS FOR GRANTING THE WRIT

POINT I

This Court Should Now Determine Whether the Destruction of Statutory Rights of Beneficiaries Under the Death on the High Seas Act, 46 U.S.C. §761, et seq., Would Be Permitted Under the Doctrine of *Forum Non Conveniens* When the Law of the Alternative Forum Precluded Classes of Beneficiaries From Any Remedy.

Corollary to the absence of a substantive remedy under English law, as taken up in the Petition of Hapag-Lloyd, etc., the procedural remedy in England was destructive of the rights of the wrongful death beneficiaries. The lack of remedy in the English Courts to proper beneficiaries under the United States statute, Death on the High Seas Act, supra, under which 12 of the 14 suits herein were brought for the wrongful deaths of officers and crew members of the "Brandenburg" resulting from the collision with the submerged but floating hull of the sunken "Texaco Caribbean", should have required the Courts below to deny the motion for dismissal out of hand.

The Death on the High Seas Act, supra, granted the right of suits by the personal representative of deceased foreign

seamen beneficiaries against a United States corporation (or a "convenience" corporation controlled by its parent), Petition of Risdal & Anderson, 291 F. Supp. 353, and *The Vulcania,* 32 F. Supp. 815. The rights under the statute flowing to the classes of beneficiaries are likewise available herein. While the beneficiaries under the Death on the High Seas Act, 46 U.S.C. §761, et seq., are "wife, husband, parent, child, or dependent relative" (upon proof of dependency the latter classes would include brothers, sisters, aunts, uncles, grandparents, and cousins). The British Lord Campbell's Act, St. 9 and 10 Vict. 93, classifies beneficiaries as "Wife, Husband, Parent and Child" (see decision of this Court in *Sea-Land* v. *Gaudet,* 414 U.S. 573, on page 18, note 6[1]).

As such, the removal of this suit to England with its absence of any remedy available to dependent relatives of the deceased (all dependent sisters, brothers, aunts, uncles, grandparents and cousins in 12 families)[2] would totally extinguish all rights of those classes of dependent relatives. The destruction of the right now available in the United States forum is far greater than as was stated by the majority opinion as "not . . . significantly inconvenienced by dismissal" (7b of appendix), or merely

---

[1] If, as the majority opinion suggested, the Lord Campbell's Act may not be applicable herein because the claimants were not British (12b of the appendix), then it is submitted that the English Court may conceivably be in the untenable position of having to rule on the facets of the Death on the High Seas Act, supra. That would create the very circumstances that the Courts in the United States have long rejected, a forum determining the applicability and nuances of foreign law where there was available a forum local to the law to be applied, more familiar with and knowledgeable of that local law, *Fitzgerald* v. *Westland,* 369 F.2d 499.

[2] And if it is conjectural (12b) how many of the families had members who could qualify, it was only because Petitioners were not permitted the opportunity to submit evidence of the existence of dependent relatives within the 12 families, although petitioners offered to submit such proof.

"less favorable" (10b of appendix) or "minimum possibility" of adverse affect (11b). In fact, the effect is catastrophic in its enormity. It would seem to require that this Honorable Court ask itself how this matter could have justifiably been dismissed and exiled to England in view of the seemingly settled law requiring the alternative jurisdiction to offer substantially same substantive and procedural rights. As set forth in the Petition of Hapag-Lloyd, etc., (pages 11 and 12, note 34 of their petition), the decision by the majority of the Court below was in conflict with the Fourth Circuit in *Heredia* v. *Davies,* 12 F.2d 500 and in *Gkiafis* v. *S/S Yiosonas,* 387 F.2d 460.

Petitioners respectfully request that this Court resolve this destruction of statutory rights of classes of beneficiaries and bring to an end the impasse between Circuits where, by its ruling herein, the Second Circuit appears to have made a grave decision against the simple justice of permitting a well founded suit to stand in the face of an alternative jurisdiction which, in fact, failed to offer the remedy pursued in the original jurisdiction to those classes of dependent relative beneficiaries represented by the Petitioners herein.

It is most respectfully submitted that this Petition be granted so that this Honorable Court may reorder a balance of importance between the emasculation of justice by the loss of right of suit by the beneficient class as against the convenience of parties set forth in the majority opinion.

POINT II

Was There an Improper Denial by the Court Below of Constitutional Rights of Beneficiaries Represented by the Petitioners Herein by the Dismissal and Forced Transfer of the Suit to England Under the Doctrine of *Forum Non Conveniens* Where the Suit, Predicated Upon United States Statutory Law, Was Properly Brought in the United States Against a United States Corporation Having Its Operation and Principal Place of Business in the United States and When the Foreign Forum Would Apply Its Local Law and Not the United States Statute Upon Which the Original Suit Was Predicated.

The majority decision by the Court below cited no case, nor has the writer learned of one, where a suit brought (1) against a United States corporation with its base of operations and principal place of business in the United States; (2) predicated upon a United States statute, the Death on the High Seas Act, supra; (3) for negligence committed within the United States by its United States office personnel, was dismissed under the doctrine of *forum non conveniens.*

This Honorable Court should review and determine whether suits properly brought in the United States against an American corporation,[3] predicated upon the

---

[3] Assuming that the majority opinion did not ignore the decision by this Honorable Court in *Hellenic* v. *Rhoditis,* 398 U.S. 306 and its own decision in *Bartholomew* v. *Universe,* 263 F.2d 437, in expressing the thought that a "flag of convenience" ship nominally owned by a subsidiary corporation, controlled by the parent corporation based in the United States or owned by United States interests, would be considered an American vessel for the purpose of the suit; with little weight to be given to the fortuitous place of injury, *Lauritzen* v. *Larsen,* 345 U.S. 571; *Romero* v. *International,* 358 U.S. 354.

United States statutory law, should remain in the United States so as not to deprive the beneficiaries of rights under the United States statute to which they were entitled.

The loss of the remedy afforded by the United States statute by reason of lack of a similar remedy to all of the classes of beneficiaries under the English Lord Campbell's Act, supra, would be disastrous to those beneficiaries whose remedies were totally extinguished by the decision to compel transfer of the claims to England. As such, it would appear to be destructive of the Constitutional rights of said classes of beneficiaries.

POINT III

The Court Below Improperly and in Conflict With Decisions of Other Courts of Appeals, Permitted a Transfer Under the Doctrine of *Forum Non Conveniens* on the Ground of Convenience to Parties Where Both the Identity of Witnesses and Their Testimony, a Requirement Under the Doctrine, Were and Are Unknown.

The Court below in its majority opinion (6b, footnote 3) considered that prospective witnesses, unidentified, with testimony unrevealed, sufficiently established convenience to parties; that the ends of justice required the dismissal in New York with suggestion of suit in England. Who the witnesses were, their availability and willingness to testify, the substance and relevancy of that testimony were all unknown and remain unknown to this day. The decision is in marked contrast to the Fourth Circuit holding in *Lekkas* v. *M/V Caledonia,* 443 F.2d 10, involving suit by Greek seamen against a flag of convenience ship, the dismissal by the lower Court vacated, as follows:

> "In the exercise of sound discretion, a district court may decline jurisdiction of a suit in admiralty brought

by foreign seamen against a foreign ship. But before acting, the district court should be fully informed about all factors that have a significant bearing on the question of retaining jurisdiction."

• • •

"When the owner asked the court to decline jurisdiction, it subjected itself, its agents and those to whom it entrusted the vessel to the obligation of furnishing on request all pertinent information for decision of its motion."

• • •

"The judgment of the district court is vacated and this action is remanded for completion of discovery on the shipowner's motion to decline jurisdiction. If the defendants do not promptly and forthrightly disclose the facts necessary for decision of this issue, the district court should apply sanctions under Fed.R. Civ.P. 37, . . ." (11).

And in *Chicago* v. *Hugh,* 232 F.2d 584, by the Tenth Circuit, holding that it was insufficient proof of convenience necessary to dismiss, to simply state the number of witnesses without further identification and showing of relevancy.

It is respectfully submitted that the evidentiary conflict between the Second Circuit and the Fourth and Tenth Circuits should be resolved in order that proper guidelines be laid down establishing the quality and quantity of proof required under the doctrine of *forum non conveniens.*

CONCLUSION

In sending plaintiffs to a forum which provided no substantive remedy to any beneficiary and no procedural remedy to some, the Court of Appeals below committed a flagrant injustice. In correcting that injustice, this Court should determine important issues of federal law:

1. Of the right of a Court to compel removal of a suit properly brought and predicated under United States law permitting a remedy to classes of beneficiaries where the alternative forum would not provide any remedy to certain numbers of the classes; and whether such forced removal was in derogation of statutory rights of the deprived and now remediless classes;

2. Whether the Court below properly denied the Constitutional rights of said beneficiaries where the suit was properly brought in the United States against a United States corporation having its base of operation and principal place of business in the United States; the suit predicated upon a United States statute, when the transfer of the matter to the foreign forum involved the loss of the statutory right;

3. Whether the conflict between the Second Circuit and the Fourth and Tenth Circuits should be resolved where the latter Circuits require a showing of identity of witnesses, availability and willingness to testify and substance of the testimony to determine relevancy, while the Court below rejected that concept as unnecessary.

Petitioners respectfully request that by reason of the foregoing, and with due consideration of the cogent, enlightening and, Petitioners believe, persuasive dissenting opinion of Circuit Judge Oakes, discussing in the strongest

terms, the errors in the majority view of the Court below, that Certiorari be granted by this Honorable Court to resolve this question of statutory right, Constitutional law and conflicts among the United States Courts of Appeals in order to redress the grave injustice which the majority decision below caused to all of the Petitioners, depriving them of all remedy, without opportunity to be heard.

Dated: November 3, 1975.

Respectfully submitted,

HARVEY GOLDSTEIN
and
FUCHSBERG & FUCHSBERG
Attorneys for Petitioners, Thomas I. Fitzgerald, as Administrator of Estate, etc.
250 Broadway
New York, New York 10007
212—962-2800

HARVEY GOLDSTEIN,
On the Petition